

No. 14361

United States
Court of Appeals
for the Ninth Circuit

V. E. STANARD, Individually and Doing Business
Under the Firm Name and Style of MALE
MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually and as Post-
master of the City of Los Angeles, State of Cali-
fornia,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JUL 2 1954

PAUL P. O'BRIEN,

CLERK

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Appeal from the United States District Court for the
Southern District of California,
Central Division.



NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

STANLEY FLEISHMAN,
6331 Hollywood Blvd.,
Hollywood 28, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
RICHARD A. LAVINE,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles, Calif.

THE [illegible] OF [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 16522-HW

V. E. STANARD, Individually and Doing Business
Under the Firm Name and Style of MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Post-
master of the City of Los Angeles, State of
California; and DOE I Through DOE IV,

Defendants.

COMPLAINT FOR INJUNCTION TO ENJOIN
DEFENDANTS FROM REFUSING TO DE-
LIVER MAIL AND FOR DECLARATORY
RELIEF

Comes now plaintiff, and complains of defendants,
and each of them, and for cause of action alleges:

I.

That this action arises under 39 U. S. C. Sections
255 and 259a; Article I, Section 8 of the Constitu-
tion of the United States; and Articles I, IV, V, VI,
VII and VIII of Amendments to the Constitution
of the United States.

II.

That the amount in controversy exceeds the sum
of \$3,000.00, exclusive of interest and costs.

III.

That at all times herein mentioned and concerned, defendant Otto K. Olesen was, and is, the duly appointed, qualified and acting Postmaster of the City of Los Angeles, State of California, [2*] and is a citizen and resident of the Southern District of California. That in his capacity as Postmaster said defendant is charged with the duties of administering and managing the United States Post Office in and for said city, and is in charge of and responsible for the receipt and distribution of material sent through the United States mail for delivery in said city.

IV.

That defendants Doe I through Doe IV are sued herein under fictitious names for the reason that their true names are unknown to plaintiff at this time. That said defendants are employees of the Post Office Department of the United States in said City of Los Angeles and are working under the supervision and direction of defendant Otto K. Olesen, to whom they are responsible for the performance of their duties. That plaintiff will ask leave of this honorable Court to amend this complaint and insert their true names herein when they have been ascertained.

V.

That plaintiff V. E. Stanard has heretofore been engaged in the business of distributing and selling through the mail certain publications, "pin-up"

*Page numbering appearing at foot of page of original Certified Transcript of Record.

pictures and novelties under the firm name and style of Male Merchandise Mart. That plaintiff has duly published and recorded with the Office of the County Clerk of the County of Los Angeles, State of California, a Certificate of Fictitious Firm Name in accordance with the provisions of Section 2466 of the Civil Code of the State of California. That there is attached hereto, as Exhibit "A" hereof, a true and correct copy of said certificate. That plaintiff has invested substantial sums of money well in excess of the sum of \$3,000.00 in said venture which has sustained irreparable damage, and the loss of which is threatened in its entirety by the action of the defendants as hereinafter alleged. [3]

VI.

That on or about the 1st day of March, 1954, without prior notice and without the holding of a hearing, defendants and each of them, under orders of the Post Office Department of the United States, arbitrarily, capriciously, wrongfully and unlawfully seized, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart, 16887 West Branch, Hollywood, California, plaintiff's business address. That, as hereinbefore indicated, no hearing was held, nor was any proceeding had prior to the seizure of plaintiff's mail, and to the date hereof defendants, and each of them, wrongfully and unlawfully and in the total absence of any authority granted by law or statute, or otherwise, so to do, continue to keep impounded all such

mail addressed and directed to plaintiff, and refuse to deliver same, or any portion thereof, to plaintiff.

VII.

That two days thereafter, to wit, March 3, 1954, there was served upon plaintiff under date of March 1, 1954, a certain "Order" issued by the Post Office Department of the United States, directing defendant Otto K. Olesen to impound and refuse to deliver plaintiff's mail pending determination of a hearing to be held in the Post Office Department, a true and correct copy of which purported "Order" is attached hereto as Exhibit "B" hereof and, by reference thereto, hereby made a part hereof as if at this point set forth in full.

VIII.

That there was simultaneously served upon plaintiff a "Notice of Hearing" and "Complaint," true and correct copies of which are attached hereto as Exhibits "C" and "D," respectively, hereof and, by reference thereto, hereby made a part hereof as if at this point set forth in full. [4]

IX.

Plaintiff herein duly filed her Answer to said Complaint, generally denying the allegations thereof and particularly denying that said merchandise and novelties, or any thereof, were obscene, lewd, lascivious and/or indecent. That a hearing was held in Washington as of said 17th day of March, 1954, at which hearing the Post Office Department failed to introduce in evidence any merchandise sold, or

offered for sale, by plaintiff. That to the date hereof no decision has been reached by the Post Office Department on said hearing, and the matter is presently under submission. That, nevertheless, defendants, and each of them, continue to keep plaintiff's mail impounded, and to the date hereof persist in their refusal to deliver to plaintiff mail matter addressed to her.

X.

That in the event said hearing should be decided adversely to plaintiff, the Post Office Department will issue its order from the Postmaster General of the United States to defendants, which order, by its terms, would direct defendants, and each of them, to return all mail matter, whether registered or not, arriving at the Post Office in the City of Los Angeles, State of California, directed to the plaintiff V. E. Stanard and/or Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, to the postmasters at the offices at which they were originally mailed, with the word, "unlawful" written or stamped on the outside thereof; such mail matter so returned to such postmasters, to be by them returned to the senders; and would forbid said defendants, or any thereof, to pay any postal money order or postal note drawn to the order of plaintiff; and would direct defendants to inform the remitter of any such postal money order or postal note that payment thereof has been forbidden. [5]

XI.

That by reason of the wrongful and unlawful im-

pounding of plaintiff's mail by defendants, and each of them, as aforesaid, and the wrongful and unlawful refusal of defendants to deliver plaintiff's mail, as aforesaid, and by reason of the additional fact that defendants threaten to return to return to senders all of said impounded mail, plaintiff has suffered, is now suffering, and will suffer irreparable loss and damage; that by reason of the foregoing, plaintiff's business has been irreparably damaged and his property seized without due process of law.

XII.

That said purported order of impound, said proceedings heretofore held before the Post Office Department and the order proposed to be issued thereunder are unlawful, void and in violation of plaintiff's constitutional rights for the following reasons:

(a) That there is no basis, statutory or otherwise, for the impounding of mail prior to hearing and pending determination of hearing; that the action of the Post Office Department in impounding plaintiff's mail is capricious, arbitrary, unlawful, and constitutes an unlawful seizure of plaintiff's property and operates in violation of the Fifth Amendment of the Constitution of the United States.

(b) That at said hearing in Washington, D. C., the Post Office Department failed to produce or introduce in evidence any merchandise whatsoever, sold or offered for sale by plaintiff, but nevertheless the hearing examiner refused, on motion, to dismiss

the proceedings for lack of evidence notwithstanding that, as aforesaid, no competent evidence was produced or introduced which would justify a finding of violation by plaintiff of any of the statutes herein involved. That plaintiff will pray leave of court to introduce as an additional exhibit in [6] this action, after it has been received, a copy of the transcript of said proceedings.

(c) That none of the material sold or offered for sale by plaintiff is obscene, lewd, lascivious and/or indecent as a matter of law.

(d) That said proceedings are unlawful and void by reason of the fact that they operate to deprive plaintiff of liberty and property without due process of law. That the statute pursuant to which said proceedings were taken violate the rights granted plaintiff by the Constitution of the United States, Article I, Section 8; Article I, Section 9, Clause 3; Articles I, IV, V, VI, VII and VIII of Amendments to the Constitution of the United States.

(e) That the Post Office Department is without jurisdiction to censor or pass upon the obscenity of books or published material which are among the items of merchandise handled by plaintiffs; that books, novels and similar publications are not encompassed by 39 U. S. Code 259a or any other Code sections upon which the Post Office proceedings are based.

For each of the reasons hereinabove stated and set forth, the acts of defendants, and each of them,

in refusing to deliver plaintiff's mail, are unlawful and deprive plaintiff of her property and right to do business without due process of law.

XIII.

That unless defendants, and each of them, are enjoined and restrained from committing the acts hereinabove alleged, and are ordered by this court to release to plaintiff all such impounded mail forthwith, plaintiff will continue to be irreparably damaged; that said defendants are continuing and threatening to continue to permit and perform said acts, refuse to release to plaintiff any of her impounded mail, and threaten to return such mail [7] matter to the senders, as hereinabove set forth, all to plaintiff's irreparable loss, harm and damage.

XIV.

That as the result of the foregoing, an actual controversy exists between plaintiff and defendants within the jurisdiction of this court, and this court should declare the rights and other legal relations between the parties hereto.

Wherefore, plaintiff prays judgment against defendants herein, and each of them, as follows:

(1) That the rights and legal relations of the parties be determined as provided by the United States Judicial Code, 28 U. S. C. Sections 2201 and 2202.

(2) That a temporary restraining order, preliminary and permanent injunction be issued herein,

directed to the defendants herein, and each of them, ordering said defendants to forthwith deliver up to plaintiff all mail matter of any kind or nature whatsoever impounded by them; enjoining them from in any manner failing or refusing to deliver, in the regular course of mail, any and all mail matter addressed to plaintiff under the name V. E. Stanard and/or Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, or anywhere else; and from in any manner carrying out or enforcing the purported "Order" of impound attached hereto as Exhibit "B" hereof; or from enforcing such order as may be issued by the Post Office Department pursuant to said purported hearing.

(3) For a declaration by this court that 39 U. S. C. 259a is unconstitutional in its entirety and void in its application to plaintiff in this action.

(4) For costs of suit herein incurred; and

(5) For such other and further relief as to this court [8] may seem meet and equitable in the premises.

CAIDIN, BLOOMGARDEN &
KALMAN,

By /s/ STANLEY R. CAIDIN,
Attorney for Plaintiff. [9]

EXHIBIT "A"

Duplicate Copy for Publication in the.....

Certificate of Business

Fictitious Firm Name

The undersigned does hereby certify that she is conducting a mail order business at Box 16887, West Branch, City of Los Angeles 46, County of Los Angeles, State of California, under the fictitious firm name of (write name in full). A separate filing is necessary for each different firm name. Male Merchandise Mart—Sailor Jock's Plain Wrapper Club and that said firm is composed of the following person, whose name and address are as follows, to wit: (state names, street addresses and cities of residence in full). V. E. Stanard, 11064½ Strathmore Drive, Los Angeles, 24, California.

Witness my hand this 15th day of February, 1954.

/s/ V. E. STANARD.

State of California,
County of Los Angeles—ss.

On this 15th day of February, A. D. 1954, before me Paul V. Parker, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appear V. E. Stanard known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ PAUL V. PARKER,
Notary Public in and for
Said County and State.

My commission expires November 11, 1954.

The Pico Post,
February 18, 25,
March 4, 11, 1954.

Notes—The California Civil Code (Section 2466) requires filing of this certificate with the County Clerk and its publication for four successive weekly insertions in some newspaper in the county. An affidavit of publication must be filed by the publisher with the County Clerk within 30 days of completion of the publication. Send all documents for filing to Los Angeles Newspaper Service Bureau, Inc., 224 W. First St., Phone MA 2541. If original certificate is sent for filing, enclose two dollars for county clerk's filing fee. All checks for two-dollar filing fee should be made payable to County Clerk. [10]

EXHIBIT B

H. E. Docket No. 2/292

In the Matter of

The Complaint That Albert J. Amateau and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Section 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

ORDER

The Solicitor for the Post Office Department having this day filed a complaint alleging upon probable cause that Albert J. Amateau and V. E. Stanard are conducting an unlawful business through the mails in violation of 18 U. S. Code, 1342 and 1461, and of 39 U. S. Code 255 and 259a, and in pursuance thereof are using the fictitious, false or assumed

names and addresses, Male Merchandise Mart and Michael Malone, 16887 West Branch, Hollywood 46, California, and it appearing from the allegations and exhibit comprising said complaint that it has become necessary to determine whether the mail addressed to the aforesaid names and addresses should be delivered to the parties claiming same or whether it should be disposed of pursuant to the provisions of the aforesaid statutes, you are hereby directed to refuse to deliver such mail to the parties claiming same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which [11] shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster General.

To the Postmaster, Los Angeles, California. [12]

EXHIBIT C

Office of the Deputy Postmaster General
Washington 25, D. C.

March 1, 1954.

H. E. Docket No. 2/292

In the Matter of

The Complaint That ALBERT J. AMATEAU and
V. E. STANARD, Using the Fictitious, False
or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Engaged in Conducting an Unlawful Enter-
prise Through the Mails as Set Forth in the
Attached Complaint.

NOTICE OF HEARING

Transmitted herewith is a copy of the Complaint
which has been filed in this proceeding pursuant to
the enclosed Rules of Practice. It is recommended

in the Complaint that the appropriate order be issued pursuant to the provisions of the statutes cited therein.

Notice Is Hereby Given that a hearing in the above-entitled proceeding will be held before a Hearing Examiner on March 17, 1954, at 10:00 a.m., in Room 3237, New Post Office Department Building, 12th and Pennsylvania Avenue, N.W., Washington 25, D. C.

If you desire to oppose the issuance of the order recommended in the Complaint an original and three copies of your answer to the Complaint must be filed with the Docket Clerk, Office of the Administrative Assistant to the Deputy Postmaster General, Post Office Department, Washington 25, D. C., on or before March 11, 1954, or you will be deemed to be in default and to have waived hearing and further procedural steps. The requirements for the filing of your answer and your appearance at the hearing are set forth in the enclosed Rules of Practice.

Transmitted herewith also is a copy of the impounding order in this case.

/s/ A. B. STROM,
Administrative Assistant. [13]

EXHIBIT D

H. E. Docket No. 2/292

5/32

Mar. 1, 1954.

In the Matter of

The Complaint That ALBERT J. AMATEAU and
V. E. STANARD, Using the Fictitious, False
or Assumed Names and Addresses:

MALE MERCHANDISE MART, and
MICHAEL MALONE, at

16887 West Branch,
Hollywood 46, California,

and

RAREPIX COMPANY,
RAREPIX CO., at

Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through
the Mails in Violation of 39 U. S. Code, Section
255 and 259a, and of Title 18 U. S. Code, 1342
and 1461.

COMPLAINT

The undersigned, Solicitor for the Post Office Department, has probable cause to believe and therefore alleges that V. E. Stanard and Albert J. Amateau of Los Angeles, California, using the fictitious, false or assumed names and addresses Male Mer-

chandise Mart and Michael Malone, at 16887 West Branch, Hollywood 46, California, and Rarepix Company and Rarepix Co., at Campbell Building, Santa Monica and Fairfax, Hollywood 46, California, are conducting, promoting and carrying on by means of the post office establishment of the United States a scheme for obtaining and attempting to obtain remittances of money through the mails for certain articles namely, books, booklets, photographs, motion pictures, playing cards, color slides, and novelties of an obscene, lewd, lascivious, indecent, filthy and vile character, and are depositing or causing to be deposited in the United States mails information as to where, how or from whom the same may be obtained [14] in violation of the provisions of 39 U. S. Code, Sections 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

(1) That public attention is attracted to the said books, booklets, photographs, motion pictures, playing cards, color slides and novelties, and information as to where, how and from whom they may be obtained is furnished by means of circulars which respondents cause to be distributed generally through the mails;

(2) That attached hereto as Exhibit "A" and hereby made a part hereof are photostatic copies of circulars mailed by respondents bearing the following captions: "Most Amazing Offer of Uncensored Books That Dare to Tell the Truth," "Rare Specials," "Naughty Bed-Time Books," "Books on Every Angle of Sex," "Are Ordinary Novels too

Tame for You? Here's Exciting, Intimate Reading That Gives You That Thrill! Pocket-Size Editions," "Sex in Prison," "Wild French Cartoons," "The Flimsey Report," "Racy, Risky Assortment of French Love Stories," "Wow! 'Wolf Deck,'" "Real Old-Time Cartoon Books," "A Cigarette Pack Peep Show," "A Pocket Art Museum," "Party Films," "To Spank or Not to Spank!" "A Pack of Beauty," "Art Slides," "Body in Art," "3rd Dimension Slides" and "Beauty in Bondage:"

(3) That the above-mentioned advertising circulars employed by respondents as aforesaid contain illustrations and descriptive statements which characterize the various articles offered for sale, namely, books, booklets, photographs, motion pictures, playing cards, color slides and novelties as erotically and sexually stimulating and as obscene, lewd, lascivious and indecent, and offer to provide and furnish same through the mails to persons remitting to respondents the sums of money stated in the aforesaid circulars.

Wherefore, premises considered, it is recommended: (a) that the postmaster at Los Angeles, California, be instructed forthwith to withhold from delivery all mail addressed to Male [15] Merchandise Mart, Rarepix Company, Rarepix Co., and Michael Malone at Los Angeles, California, pending a determination as to whether said names are being used for the purpose of carrying on an unlawful enterprise as hereinbefore alleged; (b) that an ap-

propriate order be issued pursuant to the statutes set forth in the caption and first paragraph hereof instructing the postmaster at Los Angeles, California, as to the disposition of mail addressed to Male Merchandise Mart, Rarepix Company, Rarepix Co., Michael Malone and their officers and agents as such, at Los Angeles, California.

/s/ ABE MCGREGOR GOFF,
Solicitor.

To the Chief Hearing Examiner of the Post Office Department.

Duly verified.

[Endorsed]: Filed March 19, 1954. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF V. E. STANARD IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

V. E. Stanard, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled matter. That all mail heretofore directed and addressed to this plaintiff under the name Male Merchandise Mart at 16887 West Branch, Hollywood,

California, has, since the first day of March, 1954, been seized and impounded by the Post Office Department in the City of Los Angeles, and withheld from delivery to plaintiff. That since said date, plaintiff has received no mail deliveries whatsoever so addressed and directed to her. That affiant has been advised that all such mail is presently being held under instructions of the Post Office [18] Department.

That affiant is engaged in the mail order business and so long as she fails to receive regular mail deliveries, affiant is thereby deprived of her right to conduct her business and is threatened with, and has sustained, great loss and irreparable damage by reason of the withholding of mail deliveries to her. That affiant's true name is V. E. Stanard. That said name is not a false, fictitious, or assumed name. That there is attached hereto as Exhibits "A" and "B," respectively, hereof, and by reference thereto hereby made a part hereof as if at this point set forth in full, a true and correct copy of affiant's social security card and birth certificate, identifying her by her true name. That affiant, through her attorney, offered to appear at the Post Office Department in Los Angeles to present identification and establish her identity. That she was advised that this would do her no good and that even if she satisfactorily identified herself, that her mail would not be released but would continue to be impounded. That so long as affiant's mail is impounded and deliveries are withheld, affiant is unable to conduct

her business and will continue to suffer and sustain irreparable damage and loss.

/s/ V. E. STANARD,
Affiant.

Subscribed and sworn to before me this 18th day of March, 1954.

[Seal] /s/ STANLEY R. CAIDIN,
Notary Public in and for
Said County and State.

My commission expires August 13, 1957. [19]

EXHIBIT A

[Social Security Card]

Social Security Act
Account Number

359-18-7583

has been established for

Violet Evelyn Stanard

/s/ Violet Evelyn Stanard
Worker's Signature.

[Social Security Board Seal] [20]



Exhibit B

1. PLACE OF BIRTH

STATE OF MISSOURI
Bureau of Vital Statistics
CERTIFICATE OF BIRTH

County of Linn
 Name of Marceline
 City of Marceline
 State of California 5th Ward.
 Registration District No. 502 File No. 11111
 Primary Registration District No. 305 Registered No. 39
 Birth occurs in a hospital or other institution, the name of same, instead of street and number.
 FULL NAME OF CHILD Violet Evelyn Stansford Stansford

Sex of Child Female 4. Legitimate Yes 5. Twin, triplet, or other 1 6. Number and in order of birth 1 7. Date of birth May 23 1925 (Month) (Day) (Year)

18. FULL MAIDEN NAME <u>Pearl Adams</u>	
19. FULL NAME <u>Logan Stansford Stansford</u>	
14. P. O. ADDRESS <u>Marceline, MO.</u>	
15. P. O. ADDRESS <u>Marceline, MO.</u>	
16. COLOR OR RACE <u>White</u> 10a. AGE AT LAST BIRTHDAY <u>67</u> (Year)	17. COLOR OR RACE <u>White</u> 15a. AGE AT LAST BIRTHDAY <u>38</u> (Year)
1. BIRTHPLACE <u>Pallock, MO.</u>	16. BIRTHPLACE <u>Mountain Grove, MO.</u>
2. OCCUPATION <u>Engineer</u>	17. OCCUPATION <u>Housewife</u>

8. Number of child of this mother 4 18. Number of children, of this mother, now living 4 20. Sex of full term Yes (Indicate)

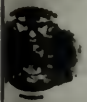
21. CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE

I hereby certify that I attended the birth of this child, who was born alive May 23, 1925 at 8:15 P.M. on the date above stated. (Date also in Section 1)

Signature Jno J. McLaughlin Physician or Midwife
 Address Brookfield, MO.

3. Given name added from supplemental report _____, 19____
 23. Filed 6/10, 1925 Olea Lutman Registrar

This certificate must be FILED with the Local Registrar within TEN (10) days after birth.



STATE OF MISSOURI
 CITY OF JEFFERSON
 I HEREBY CERTIFY that the above is a true and correct copy of the certificate for the person named therein. The original record being filed in the Central Bureau of Vital Statistics of the State of Missouri in part of the permanent records of said Bureau. WITNESS my hand as State Registrar of Vital Statistics and the Seal of the Missouri State Board of Health this date of _____
 State Registrar of Vital Statistics Per _____

Endorsed: Filed March 19, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY R. CAIDIN IN
SUPPORT OF MOTION FOR TEMPO-
RARY RESTRAINING ORDER AND PRE-
LIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Stanley R. Caidin, being first duly sworn, deposes and says:

That he is an attorney duly qualified to practice, and practicing, before all of the courts of the State of California. That he appeared as counsel for plaintiff in a hearing held as of the 17th day of March, 1954, before the Post Office Department in Washington, D. C.

That at said hearing the Post Office Department failed to produce or introduce in evidence any merchandise sold, or offered for sale, by plaintiff herein. That two witnesses were presented in support of the Post Office Department's case and both of [22] said witnesses admitted on cross-examination that neither of them had ordered or received any merchandise whatsoever from plaintiff herein. That the Post Office Department rested its case solely on the basis of certain advertising and circulars purportedly sent through the mail by plaintiff.

That prior to said hearing affiant personally spoke to Post Office Inspector Ward in Los Angeles and offered to produce his client, V. E. Stanard, for the

purpose of presenting identification to establish that she is not a fictitious person, and that her name is V. E. Stanard. That Inspector Ward told affiant that it would do no good to appear for the purpose of identifying affiant's client, that her mail was being withheld by reason of an order issued from the Department in Washington, and that the mail would not be released by the Post Office in Los Angeles regardless of whether affiant's client appeared to identify herself in accordance with 39 U. S. Code 255.

/s/ STANLEY R. CAIDIN,
Affiant.

Subscribed and sworn to before me this 18th day of March, 1954.

[Seal] /s/ LORRAINE NATHE,
Notary Public in and for
Said County and State.

My commission expires October 30, 1957.

[Endorsed]: Filed March 19, 1954. [23]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

To the Above-Named Defendant Otto K. Olesen,
Postmaster of the City of Los Angeles, State of
California:

It Is Hereby Ordered that the defendant above named appear before the District Court of the United States for the Southern District of California, Central Division, in the courtroom of the Honorable Harry C. Westover, located in the Federal Building, Los Angeles, California, on the 25th day of March, 1954, at the hour of 10 o'clock a.m., of said day, then and there to show cause, if any you have, why you should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to said plaintiff at 16887 West Branch, Hollywood, California, or anywhere else, and why you should not be enjoined from refusing to [24] deliver any and all such mail matter as may have been heretofore, or may hereafter be, mailed to plaintiff at said address, or elsewhere, and from enforcing in any respect whatsoever such order or orders concerning the disposition of such mail matter as may have been, or may hereafter be, issued by the Post Office Department of the United States.

Dated this 19th day of March, 1954.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 19, 1954. [25]

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications, "pin-up" pictures and novelties, under the firm name and style of Male Merchandise Mart. On March 1, 1954, the Solicitor for the Post Office Department filed a complaint, alleging upon probable cause that Albert J. Amateau and V. E. Standard were conducting an unlawful business through the mail in violation of 18 U. S. Code, 1342 and 1461, and of 39 U.S. Code, §255 and §259a. [49]

It appearing from the allegations and from the exhibits comprising the complaint that it was necessary to determine whether the mail addressed to the aforesaid parties should be delivered to them or whether it should be disposed of pursuant to the above-mentioned statutes, an order was addressed to the Postmaster at Los Angeles, California, directing him "to refuse to deliver such mail to the parties claiming same until their identity and the character of the business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon a date which shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Subsequent to receipt of the order the Postmaster refused to deliver to plaintiff any mail addressed to

her, arriving at the Los Angeles Post Office. On March 1, 1954, a notice was given of a hearing to be held before a hearing examiner on March 17, 1954, in the New Post Office Building, Washington, D. C. On March 17, the plaintiff appeared before the examiner in Washington, D. C., and at that time there was presented to the hearing officer certain advertisements which had been sent through the mail by plaintiff by which she solicited orders for certain cartoon books, party films, art books, et cetera. None of the articles offered for sale were presented to the examiner, and no evidence was received that any of such articles had been transported through the mail. However, the advertising pamphlets were sent through the mail, and orders emanating therefrom were transmitted by mail from the sender to Los Angeles, California. The matter was taken under submission by the hearing officer, and up to the present date no decision has been made by the hearing officer as to whether or not plaintiff has violated the statute. [50]

On March 19, 1954, this action was filed by which plaintiff has asked this court to determine the rights and legal relations of the parties, as provided by U. S. Judicial Code, Title 28, §§2201-2202, and that a temporary restraining order and permanent injunction be issued, restraining and enjoining the defendants from impounding the mail belonging to plaintiff herein. It is plaintiff's contention that the Postmaster General cannot make an order impound-

ing her mail until there has been a determination that plaintiff is guilty of a violation of law.

The complaint filed by the Solicitor alleges there is "probable cause" that plaintiff is in violation of the statute. The complaint does not allege plaintiff was violating but alleges only that there is "probable cause" to believe plaintiff to be in violation. Inasmuch as it would take some time to determine whether or not plaintiff is in violation, the Postmaster General (without waiting for such determination), directed the Postmaster at Los Angeles to impound the mail. This, plaintiff alleges, cannot be done.

Plaintiff as authority for her position cites to the court *Donnell Mfg. Co. v. Wyman*, 156 Fed. 415, and *Meyers v. Cheesman*, 174 Fed. 783. Counsel for plaintiff asserts these are the only two cases found in the reports dealing with the matter at hand and that each sustains plaintiff's contention that it is impossible for the Postmaster General to impound plaintiff's mail until there has been determination that such mail is unlawful.

The first case above was decided by a District Court in Missouri and the second, by a District Court in Kentucky. Inasmuch as both were decided by District Courts, neither is binding upon this court. [51]

A similar contention was made in *Wallace v. Michael D. Fanning*, No. 15,499-T, tried by one of the members of this court—the Honorable Leon R. Yankwich—in June, 1953. Judge Yankwich, in his

remarks from the bench, pointed out that the two cases above cited were District Court cases, not binding upon him, and he refused to follow them. The same problem was there presented to the court as is presented here—whether or not the Post Office Department can (under §§255 and 259a), prior to a finding that literature is obscene, make an order impounding such literature. Judge Yankwich ruled:

“* * *, in my opinion, under the broad powers given by the law to a postmaster under Section 255, relating to fraudulent schemes, and 259-a, relating to obscene literature, that when information reaches the postmaster he may have a reasonable time, while instituting proceedings, to stop the mail temporarily until the order is determined.”

The Donnell Mfg. Co., and Meyers cases, *supra*, were tried in 1907 and 1909, respectively. The Wallace case, tried in 1953, is recent. It has the same standing before this court as the two prior cases, and this court is of the opinion that the Wallace case should be followed.

From the record before this court it appears administrative procedures are now being pursued by the respective parties. There has been no exhaustion of administrative remedies, and it would appear to this court that the Postmaster General should, in following administrative procedure as outlined by Congress, have a reasonable time after the proceedings have been initiated to determine whether there has [52] been a violation. There is no evidence be-

fore the court to show the proceedings are not being pursued promptly; and in the usual course the Post Office Department will make a determination whether or not the articles in question come within the statute. If the determination is adverse, plaintiff may appeal therefrom and, eventually, may present the entire matter to the District Court. That is not now before us. The only question before this court is whether, after initiating proceedings, the Postmaster General has a right to impound mail until there has been a final determination of the matter.

The question of exhaustion of administrative remedies has been discussed at length by the Ninth Circuit in *Home Loan Bank Board v. Mallonee*, 196 F.2d 336. At page 380, the Court lays down the rule:

“* * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”

In the case at bar, plaintiff points out that if the court does not restrain the Postmaster from impounding her mail, she is virtually out of business and will be caused irreparable injury.

In the *Home Loan Bank Board* case, *supra*, great emphasis was laid on the injury to the association which would result if it was necessary to proceed with the administrative remedy; and at page 381 the Court said:

“The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing [53] them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention.”

When it was determined that administrative remedies had not been exhausted, the Circuit Court criticized the trial court for not immediately dismissing the action. The Court said, at page 382:

“The trial court erred when it failed to immediately dismiss * * * on the ground that * * * available administrative remedies were not first exhausted. Failure of the court to dismiss these actions * * * merely compounded the original error of the court in entertaining them at the outset of the litigation * * *, and at this point we strongly emphasize that at that time prompt and final disposition of the conservatorship issue by securing through the administrative process a final and judicially reviewable order or determination on the issue of the validity of the conservatorship, would have then laid that issue at rest thereby disposing of the one great controversy which inspired the Mallonee-Association bracket of this litigation.”

In the case at bar it appears from the evidence before the court that there are administrative remedies available to plaintiff; that plaintiff is now pursuing her administrative remedies, and that such administrative remedies have not been exhausted. As a

consequence, this court does not have jurisdiction of the matter at all; therefore, [54] plaintiff is not entitled to the relief asked by her complaint. When it appears, as it does here, that a court does not have jurisdiction, it is the duty of the court to immediately dismiss the action.

“* * *, Federal Rules of Civil Procedure 12(h), 28 U.S.C.A., applies. The pertinent portion of that rule is ‘* * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. * * *’”

Zank v. Landon,
205 F.2d 615 at 616.

Plaintiff's action is dismissed.

Dated this 1st day of April, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed April 1, 1954. [55]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 1, 1954

Present: Hon. Harry C. Westover,
District Judge.

Proceedings:

This cause, after hearing on Order to Show Cause, was submitted, and the Court having duly considered

the pleadings and the law applicable, and being fully advised in the premises signs and orders filed its Memorandum and in accordance therewith Orders plaintiff's action Dismissed.

Filed Memorandum.

Mailed copies to counsel.

EDMUND L. SMITH,
Clerk;

By MARY O. SMITH,
Deputy Clerk. [56]

United States District Court for the Southern
District of California, Central Division

Civil No. 16522-HW

V. E. STANARD, Individually and Doing Business
Under the Firm Name and Style of MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Post-
master of the City of Los Angeles, State of Cali-
fornia; and DOE I Through DOE IV,

Defendants.

JUDGMENT OF DISMISSAL

A hearing upon plaintiff's Order to Show Cause and Motion re Preliminary Injunction having been

had on the 25th day of March, 1954, before the Honorable Harry C. Westover, Judge presiding, in the above-entitled court, plaintiff having been represented by her attorneys, Caidin, Bloomingarden & Kalman, by Stanley R. Caidin, and defendant Otto K. Olesen, individually and as Postmaster of the City of Los Angeles, having been represented by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and Richard A. Lavine, Assistants United States Attorney; affidavits having been submitted by plaintiff; and exhibit having been submitted by defendant Otto K. Olesen; and Points and Authorities having been submitted by plaintiff and by defendant Otto K. Olesen; and

It appearing to the court that under the powers given to the Postmaster [57] General by Section 255 and Section 259(a) of Title 39, United States Code, the Postmaster General may have a reasonable time, while instituting and completing proceedings, to stop the mail temporarily until the administrative hearing and proceedings are concluded, and the final administrative order is determined; and

It further appearing to the Court, from evidence submitted, that there are administrative remedies available to the plaintiff, that plaintiff is now pursuing her administrative remedies, and that such administrative remedies have not been exhausted, by reason of which this Court does not have jurisdiction of the subject matter, and plaintiff is therefore not entitled to the relief prayed for in her complaint.

Now Therefore It Is Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby dismissed for want of jurisdiction of the subject matter.

Costs taxed at \$5.00.

Dated: This 12th day of April, 1954.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form this 12th day of April, 1954.

CAIDIN, BLOOMGARDEN &
KALMAN,

By /s/ STANLEY FLEISHMAN,
Attorneys for Plaintiff.

Presented by

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief Civil Division;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

/s/ RICHARD A. LAVINE,
Assistant U. S. Attorney.

[Endorsed]: Filed April 12, 1954.

Docketed and entered April 12, 1954. [58]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that V. E. Stanard, individually and doing business under the firm name and style of Male Merchandise Mart, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the complaint herein made and entered in this matter by the United States District Court, Honorable Harry C. Westover, Judge presiding.

Dated: April 12, 1954.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1954. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 63, inclusive, contain the original Complaint; Separate Affidavits of V. E. Stanard and Stanley R. Caidin; Order to Show Cause re Preliminary Injunction; Points and Authorities in Support of Motion for Preliminary Injunction; Opposition to Motion for Preliminary Injunction; Memorandum; Judgment of Dismissal; Notice of Appeal and Designation of Record on Appeal and a

In the United States Court of Appeals
for the Ninth Circuit

No. 14361

V. E. STANARD, Individually and Doing Business
Under the Firm Name and Style of MALE
MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually and as Post-
master of the City of Los Angeles, State of Cali-
fornia; and DOE I Through DOE IV,

Appellees.

DESIGNATION OF POINTS ON APPEAL
AND DESIGNATION OF APPEAL

V. E. Stanard, the Appellant herein, hereby designates the following as the points upon which she intends to rely in the within appeal.

I.

The Postmaster General was without statutory authority, expressed or implied, to issue the impound order.

II.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is violative of the First Amendment as a prior restraint on communication.

III.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity constitutes an infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee.

IV.

The impounding of appellant's mail without a hearing and before there has been any final determination of illegal activity is in violation of the Administrative Procedure Act.

V.

The impound order was a final order subject to judicial review and the trial court erred in ruling that the order was not subject to judicial review.

The appellant designates the entire record certified by the Clerk of the District Court as the record to be printed.

Dated: May 28, 1954.

Respectfully submitted,

/s/ STANLEY FLEISHMAN,
Attorney for Appellant.

Affidavit of Mailing attached.

[Endorsed]: Filed June 1, 1954.

